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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re N.D., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. Y.B., Defendant and Appellant.	D077281 (Super. Ct. No. 520178A,B)

APPEAL from judgments of the Superior Court of San Diego County, Browder A. Willis, Judge. Affirmed.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County Counsel and Jesica N. Fellman, Deputy County Counsel, for Plaintiff and Respondent.

Y.B. (Mother) appeals judgments declaring her minor children, daughter N.D. and son A.M., dependents of the juvenile court and removing them from her custody. Mother contends that the petitions were facially insufficient, the evidence was insufficient to support the court's jurisdictional findings and dispositional order, and the reunification services included in her case plan were unwarranted and overly burdensome. We disagree and affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

In September and October 2019, the San Diego County Health and Human Services Agency (Agency) received a series of referrals initiated by Mother regarding the possible sexual abuse of her two children, 12-year-old N.D. and her five-year-old brother, A.M. Mother observed A.M. masturbating and assumed N.D. was molesting him because she had been molested by her biological father when she was very young.[1] A.M.'s father (Father) was not N.D.'s biological father.[2]

Mother questioned N.D., who claimed that Father forced the children to masturbate together and touch each other while he filmed them. Mother later explained that she also saw A.M. drawing penises, adding to her concerns. Mother opined that Father had been recording the children for

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1 Mother informed the Agency that N.D.'s biological father lived in Mexico and that she had no contact information. The Agency's efforts to locate him were unsuccessful and he did not appear in the proceedings below.

2 Father has not appealed from the judgments and is discussed only to the extent his involvement affects the issues raised by Mother on appeal.

over a year and was selling the videos to fund his "gambling problem." In a subsequent referral, Mother recounted another recent incident when she saw A.M. limping after taking a shower. When questioned, A.M. told Mother that N.D. had put her finger up his anus, but N.D. denied she did so. The police encouraged Mother to take A.M. for a medical exam but she declined to do so.

When questioned by the police, N.D. stated that Mother often left the children home alone for long periods at night. N.D. also claimed that Father, who worked for the Department of Homeland Security, told her that he would put Mother in jail if N.D. did not allow him to film her masturbating. N.D. claimed this happened multiple times and Father also made her touch A.M. N.D. admitted to watching pornography on her electronic devices and that although Mother was aware of her viewing habits, Mother took no actions in response. A social worker attempted to interview A.M., but he either refused or was unable to answer any of her questions.

Mother admitted to struggling with anxiety and alcohol abuse. After she completed a drug test revealing the presence of THC, she reported that she smoked marijuana to help her cope with her alcohol problem and to reduce her anxiety. Mother often left the children home alone all night and then slept all day.

On October 17, 2019, Mother contacted the social worker again after N.D. attempted to commit suicide with a knife while Mother was home. Other than calling the social worker, Mother took no action in response.

The next day, the Agency filed petitions in the juvenile court as to both children under Welfare and Institutions Code section 300, subdivision (d),[3] alleging both children had been sexually abused or there was a substantial

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[3] Subsequent statutory references are to the Welfare and Institutions Code.

risk of sexual abuse and Mother had failed to adequately protect the children from abuse. The children were taken into protective custody.

At a detention hearing, the court found the children's out-of-home detention was necessary due to a substantial danger to their physical health and emotional well-being and because there were no reasonable means to protect them without removal. The juvenile court found that the Agency had made an adequate showing the children were both persons described by section 300, subdivision (d), and ordered them detained in out-of-home care.

In the jurisdiction report, the Agency social worker noted that days after the detention hearing, Mother informed the social worker that N.D. was recanting her statements regarding Father. Mother now claimed that she knew nothing about N.D.'s sexual abuse of A.M. until recently. The social worker also met with N.D., who explained that she changed her statements after Mother and Mother's friend took her to church and told her to "tell the truth." N.D. stated that she lied because she wanted Mother to leave Father to escape the ongoing domestic abuse in their relationship. The social worker also attempted to interview A.M., but he continued to refuse to talk. The Chula Vista Police Department informed the social worker that because N.D. recanted her allegations against Father, it would be closing its criminal investigation. Despite N.D.'s recantation, the Agency remained concerned about the children's well-being and the parent's ability to safely supervise and protect the children. Accordingly, the Agency recommended the court declare both children to be dependents, that they remain in out-of-home care, and that reunification services be provided to both parents.

In an addendum report filed in January 2020, the Agency detailed continued visits between the children and Mother and her early participation in services, but noted concerns regarding Mother's mental health. In its

assessment, the Agency continued to express concerns for the children's safety, explaining that a forensic interviewer found N.D.'s initial statements to be very credible and expressing concern that Mother was placing her own needs before the needs of the children. The Agency believed that Mother persuaded N.D. to recant after realizing that Father's criminal prosecution would leave her without financial support.

At a contested jurisdiction and disposition hearing, the Agency moved to dismiss the original petitions filed under section 300, subdivision (d), and to proceed on amended petitions under section 300, subdivision (b). The amended petitions alleged that Mother left the children "unattended and inadequately supervised" despite her knowledge that N.D. had previously abused A.M. and suspected recent sexual abuse of the children evidenced by A.M.'s masturbation and N.D.'s viewing of pornography. As alleged, the parents' failure to properly supervise the children despite knowledge of these concerns created a "substantial risk [the children] will suffer serious physical harm or illness."

The trial court dismissed the original petitions and accepted the amended petitions. Upon arraignment, the court accepted Father's denial of the allegations. Likewise, the court entered Mother's denial of the allegations and she informed the court that she was "ready to proceed on the contested jurisdiction and disposition trial."

The Agency submitted on the documentary evidence and no party presented additional evidence or testimony. Mother's counsel argued that the evidence was insufficient to make a true finding on the allegations in the petition. Mother also contended that the recommended case plan was overburdensome for Mother given her "transportation issues, language barriers, and ability to move through the system and satisfy every one of

those classes with the time frames that this court wants to see to facilitate reunification."

After considering the evidence and arguments of counsel, the court made true findings on the allegations of the amended petitions. The court found that the evidence demonstrated that the children were "hyper-sexualized to the point where abuse is either suspected or obvious, [creating] a very clear protective issue." The court further noted that the untreated domestic violence between the parents and Mother's substance abuse created "additional protective or safety concerns or issues." Additionally, the court expressed its "alarm" at Mother's placing of blame on N.D. rather than herself.

The court removed the children from their parents' custody, placed them in foster care, allowed supervised sibling visitation, and permitted supervised visitation between Father and A.M. Mother was permitted to continue her supervised visits with both children, with the social worker given discretion to allow overnight visits and a 60-day trial visit.

The court granted reunification services to parents. Mother's case plan included sexual abuse non-protecting parenting group sessions, a domestic violence course, a psychological and medical evaluation, and substance abuse counseling.

Mother timely appealed the court's orders made at the jurisdiction and disposition hearing.[4]

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[4] In a dependency proceeding, the dispositional order constitutes a judgment and the jurisdictional findings may be reviewed in an appeal from the dispositional order. (See, e.g., *In re S.B.* (2009) 46 Cal.4th 529, 532; *In re Tracy Z.* (1987) 195 Cal.App.3d 107, 112.)

DISCUSSION

I

Mother contends the amended petitions were facially insufficient because the facts alleged do not support that the children were at any substantial risk of serious physical harm or illness. Although Mother contends she raised the issue below by challenging the sufficiency of the evidence to support the allegations, she made no challenge to the facial sufficiency of amended petitions.

Mother cannot raise this claim for the first time on appeal. In *In re S.O.* (2002) 103 Cal.App.4th 453, 460 (*S.O.*), this court held that a parent forfeits "her right to contest the sufficiency of [a section 300] petition by failing to do so below." In so holding, this court disagreed with *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397, in which the court held that the sufficiency of a section 300 petition can be challenged for the first time on appeal. In *S.O.* this court followed the holding of *In re Shelley J.* (1998) 68 Cal.App.4th 322, 328-329, in which the court held that a party forfeits her right to challenge the sufficiency of a section 300 petition by failing to raise the claim in the trial court. The court in *In re Shelley J.* noted that the *In re Alysha S.* court improperly relied on the Code of Civil Procedure, which is not applicable to dependency proceedings. (*In re Shelley J., supra,* at p. 328.) We adhere to *S.O.* and continue to hold that "*In re Shelley J.* represents the better view." (*S.O., supra*, at p. 459.) Therefore, because Mother did not claim in the trial court that the petition was facially defective, she is barred from raising that claim on appeal. (*Id.* at p. 460.)

Regardless, Mother's contention that the petition is insufficient is without merit. "To state a cause of action, a dependency petition must contain the 'code section and the subdivision under which the proceedings are

instituted,' as well as 'an allegation pursuant to that section' (§ 332, subd. (c)) and a 'concise statement of facts, separately stated, to support the conclusion that the child upon whose behalf the petition is being brought is a person within the definition of each of the sections and subdivisions under which the proceedings are being instituted.' (§ 332, subd. (f).) 'This does not require the pleader to regurgitate the contents of the social worker's report into a petition, it merely requires the pleading of essential facts establishing at least one ground of juvenile court jurisdiction.' [Citation.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 410.)

The reviewing court construes the pleaded facts in favor of the petition to determine whether the Agency pleaded sufficient grounds to bring the child within the provisions of section 300. (*In re Kaylee H.* (2012) 205 Cal.App.4th 92, 108 (*Kaylee H.*).)

Here, the Agency alleged its jurisdiction arose under section 300, subdivision (b)(1), which provides, in relevant part: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse."

Thus, jurisdiction under subdivision (b)(1) is appropriate where the evidence shows (1) the parent is unable to adequately protect or supervise the child, (2) which causes (3) serious physical harm or illness to the child, or a substantial risk of such harm or illness. (*In re R.T.* (2017) 3 Cal.5th 622, 629.) "[E]vidence of past events may have some probative value in

considering current conditions. But under section 300, subdivision (b) this is only true if circumstances existing at the time of the hearing make it likely the children will suffer the same type of 'serious physical harm or illness' in the future." (*In re Janet T.* (2001) 93 Cal.App.4th 377, 388 (*Janet T.*), italics omitted, fns. omitted.) " '[P]revious acts of neglect, standing alone, do not establish a substantial risk of harm; there must be some reason beyond mere speculation to believe they will reoccur.' " (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1394, italics omitted.)

Mother's main challenge to the sufficiency of the allegations appears to be centered on the contention that even if N.D. sexually abused A.M., "there were no allegations [N.D.]'s sexual touching resulted in serious physical harm nor were there allegations indicating the acts would continue in the future."

Mother offers no authority to support her contention that sexual abuse does not constitute "serious physical harm." Courts are in broad agreement that an allegation under section 300, subdivision (b), may be premised on sexual abuse of the child. (See, e.g., *In re S.C., supra,* 138 Cal.App.4th at pp. 410-411 [allegations of failure of parent to protect child from sexual abuse "unquestionably" states a cause of action under section 300, subdivision (b)]; *In re D.G.* (2012) 208 Cal.App.4th 1562, 1573 [evidence of Mother's failure to adequately protect children from molestation support finding of jurisdiction under section 300, subdivision (b)]; *In re Alysha S., supra*, 51 Cal.App.4th at pp. 398-399 ["lewd touching," if repeated with the risk acts may continue in the future, may constitute "serious physical harm"].)

As alleged in the amended petitions, both N.D. and A.M. exhibited continuing sexualized behavior, with A.M. suffering trauma-related symptoms of a child who has suffered sexual abuse. The court concluded that this sexualized behavior by young children suggested that both children were

being sexually abused regardless of N.D.'s recantation of her original identification of Father as the perpetrator. Mother is alleged to have been aware of the sexual abuse but continued to leave the children home alone, sharing the same room, without adequate supervision, which created the opportunity for the abuse to occur. Such allegations are sufficient to state a claim under section 300, subdivision (b).

II

Mother contends the court's jurisdictional findings under section 300, subdivision (b), were not supported by substantial evidence. She asserts there was no evidence her children were suffering, or were at risk of suffering, serious physical harm and that her inadequate supervision caused any serious physical harm or risk of such harm. We disagree.

In reviewing the sufficiency of the evidence on appeal, we consider the entire record to determine whether substantial evidence supports the juvenile court's findings. Evidence is "substantial" if it is reasonable, credible and of solid value. (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1140.) We do not pass on the credibility of witnesses, resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if other evidence supports a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the findings or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

Juvenile dependency proceedings are intended to protect children who are currently being abused or neglected, "and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that

harm." (§ 300.2.) "The court need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child." (*In re R.V.* (2012) 208 Cal.App.4th 837, 843; *In re Heather A.* (1996) 52 Cal.App.4th 183, 194-196.) The focus of section 300 is on averting harm to the child. (*In re Jamie M.* (1982) 134 Cal.App.3d 530, 536.)

Although "the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm" (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824), the court may nevertheless consider past events when determining whether a child presently needs the juvenile court's protection. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135; *In re Troy D.* (1989) 215 Cal.App.3d 889, 899-900.) A parent's past conduct is a good predictor of future behavior. (*In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169-1170.) "Facts supporting allegations that a child is one described by section 300 are cumulative." (*In re Hadley B.* (2007) 148 Cal.App.4th 1041, 1050.) Thus, the court "must consider all the circumstances affecting the child, wherever they occur." (*Id.* at pp. 1048-1049.)

As discussed *ante*, section 300, subdivision (b), provides a basis for juvenile court jurisdiction if the child has suffered, or there is a substantial risk the child will suffer, serious physical harm or illness as a result of the parents' failure to adequately supervise or protect the child or provide adequate medical treatment.

Here, the evidence supports the trial court's finding that both children were at substantial risk of physical harm as a result of their parents' failure to adequately supervise and protect the children. As the trial court found, both N.D. and A.M. exhibited "hyper-sexualized behavior" such that sexual abuse was "either suspected or obvious," regardless of who the perpetrator may have been. This suspected abuse placed the children at risk both

directly and indirectly. N.D. admitted to inappropriately touching her brother in the past and continuing to view pornography, demonstrating her hyper-sexualized behavior. Mother also informed the social worker that A.M. reported to her that more recently, N.D. put her fingers up his anus while taking a shower, causing him to limp in apparent pain. Although the record contained no evidence of direct sexual abuse perpetrated on N.D.—if her suspicious recantation of her previous statements are accepted, as the trial court did below—the court could still reasonably conclude that her hyper-sexualized actions and statements suggested obvious sexual abuse.

Despite Mother's knowledge of these incidents, she repeatedly left the young children home alone and permitted the children to continue to share a room. When Mother was home with the children, she was known to sleep all day and was "groggy and incoherent" while supervising the children. Moreover, she admitted to substance abuse problems, which the court concluded exacerbated its concerns regarding her ability to protect the children. Additionally, she failed to take appropriate steps to address specific incidences of harm after they occurred. When A.M. told Mother he was abused, she failed to take him for a medical examination against the advice of law enforcement. Later, while Mother was home, N.D. attempted to commit suicide and Mother failed to take N.D. for an assessment in response to the suicide attempt.

This evidence — showing the children likely suffered sexual abuse in the past while being neglected by Mother and that the risk of future harm continued unabated — is sufficient to support the court's jurisdictional findings under section 300, subdivision (b). While Mother asks this court to consider other evidence in the record suggesting she is now able to safely parent the children, it is not the role of this court on appeal to reweigh the

evidence. Viewing the evidence in the light most favorable to the trial court's findings, we conclude substantial evidence supported the court's jurisdictional findings.

III

Mother challenges the sufficiency of the evidence to support the dispositional order. She contends substantial evidence did not support the court's finding the children needed to be removed from her care because she was cooperating with the Agency, participating in services by the time of the jurisdiction and disposition hearing, and that reasonable protective measures could have been put in place to prevent removal.

Before the court may order a child physically removed from his or her parent's custody under section 361, subdivision (c)(1), it must find, by clear and convincing evidence, "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's, guardian's, or Indian custodian's physical custody."

A removal order is proper if based on parental inability to provide adequate care for a child and proof of a potential detriment if the child remains with the parent. (*In re Miguel C.* (2011) 198 Cal.App.4th 965, 969.) The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. (*In re Diamond H., supra*, 82 Cal.App.4th at p. 1136.) We review the court's dispositional findings for substantial evidence. (*In re Lana S.* (2012) 207 Cal.App.4th 94, 105; *In re N.M.* (2011) 197 Cal.App.4th 159, 170.)

Here, the court removed the children from Mother's custody because the evidence showed the children were being harmed by suspected sexual abuse and Mother was unable to provide appropriate care for them. Accepting that Mother was participating in services and was willing to continue her participation, she had only just begun her participation and her ability to understand the services was questionable. Rather than attempting to address the underlying source of abuse, Mother was focusing her blame on N.D. The social worker opined that N.D. was very credible and Mother appeared more concerned with continuing to receive support from Father rather than protecting her children. Given Mother's long-standing substance abuse, the history of domestic abuse within the household, the years of sexual abuse concerns, and Mother's treating N.D. as a "scapegoat," the court was reasonably concerned with returning the children to Mother's care in the early stages of her participation in services. Thus, ample evidence supported a finding there were no reasonable means to protect the children without removing them from Mother's custody.

IV

Finally, Mother challenges the trial court's ordered reunification services, which included domestic violence and substance abuse services, on the basis that they targeted conditions that did not lead to the children's detention and created an unreasonable burden she would not be able to fulfill.

"With some limited exceptions not relevant here, section 361.5 requires the juvenile court to order child welfare services for both parent and child when a minor is removed from parental custody." (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1228.) "Of course, the juvenile court's discretion in fashioning reunification orders is not unfettered. Its orders must be 'reasonable' and

'designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300.' (§ 362, subd. (c).) 'The reunification plan " 'must be appropriate for each family and be based on the unique facts relating to that family.' " [Citation.]' " (*Nolan W., supra,* at p. 1229; see *In re Basilio T.* (1992) 4 Cal.App.4th 155, 172-173.) We review the propriety of court-ordered reunification services at this stage for abuse of discretion. (*In re Briana V.* (2015) 236 Cal.App.4th 297, 311; see *Nolan W., supra,* at p. 1229.)

Here, Mother specifically contends the trial court abused its discretion by requiring her to participate in domestic violence and substance abuse services because those issues did not lead to the children's detentions. " ' "A reunification plan formulated to correct certain parental deficiencies need not *necessarily* address other types of conduct, equally deleterious to the well-being of a child, but which had not arisen at the time the original plan was formulated." ' [Citation.] However, when the court is aware of other deficiencies that impede the parent's ability to reunify with his child, the court may address them in the reunification plan." (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1008.)

"The juvenile court has authority to require a parent to submit to substance abuse treatment as part of a reunification plan as long as the treatment is designed to address a problem that prevents the child's safe return to parental custody." (*Nolan W.*, *supra*, 45 Cal.4th at p. 1229.) Mother contends that her substance abuse had no effect on her ability to supervise the children, but the record suggests otherwise. Mother admitted to drinking socially, using marijuana daily, and Father suggested she may be abusing prescription medication. The trial court could reasonably conclude that Mother's substance abuse led to her neglect of the children when she

was often gone all night and then either slept all day or was "groggy and incoherent" while the children were in her care.

Additionally, while the record does not suggest that the children themselves were the victims of domestic violence between the parents, they witnessed severe physical confrontations between Mother and Father and N.D. attempted to intervene at least once. While Mother contends that she no longer lives with Father and, therefore, any future risk of domestic violence is impossible, the evidence establishes that Mother initiated the violence on some occasions and scored "very high" on the risk of recidivism during a domestic violence assessment process. The court could reasonably rely on this evidence to conclude that the children were not safe to return to Mother's care until she addressed her issues with domestic violence and substance abuse, which were both likely to continue absent treatment.

Mother makes a generalized argument that the totality of the reunification services are too burdensome and she will not be able to complete them given her transportation issues and a "language barrier." However, Mother offered no evidence below to substantiate these claims. Her speculative claims on appeal are insufficient to establish any abuse of discretion by the trial court in crafting her case plan.

DISPOSITION

The judgments are affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

AARON, J.